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MADISONIAN PORNOGRAPHY OR, THE IMPORTANCE OF JEFFREY SHERMAN

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INTRODUCTION

For over a century, lawyers and scholars have debated whether pornography is protected by the free speech principle.[1] In this essay, I will show why Jeffrey Sherman's 1995 article, *Love Speech: The Social Utility of Pornography*,[2] makes a major contribution to this debate, even though it never explicitly addresses it.

I will begin with the fundamentals of free speech theory. Why is there free speech protection at all? I will describe the classic answer to this question developed by James Madison. Then I will rebut the narrow construction of Madison's argument that was once proffered by Robert Bork. I will show why Madison's argument reaches toward, but does not fully defend, a right to pornography. Then I will show why Sherman's work completes the Madisonian argument.

* John Paul Stevens Professor of Law and Professor of Political Science, Northwestern University. Thanks to Harry Clor, Jason DeSanto, Rick Garnett, Edward Hartnett, Marc Poirier, Martin Redish, Frederick Schauer, Jeffrey Sherman, Steven D. Smith, and the Seton Hall University School of Law faculty colloquium for comments. Special thanks to Thomas Healy for unusually probing and tenacious criticism. Thanks, as usual, to Marcia Lehr for indispensable research assistance. When I was invited to contribute to this issue, I was told that the issue would be dedicated to Prof. Sherman, but that the articles should be about general issues of sexual orientation and the law, and were not expected to be about his scholarship. However, since I have several times gestured toward that scholarship in making a point about free speech law, this is a good place to turn that gesture into a reasoned argument. *See* Andrew Koppelman, *Is Pornography "Speech"?*, 14 LEGAL THEORY 71, 83 n.58 (2008); Andrew Koppelman, *Free Speech and Pornography: A Response to James Weinstein*, 31 N.Y.U. REV. L. & SOC. CHANGE 899, 910 n.64 (2007); Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635, 1661 n.133 (2005) (all citing Sherman).

1. *See generally* HELEN LEFKOWITZ HOROWITZ, REREADING SEX: BATTLES OVER SEXUAL KNOWLEDGE AND SUPPRESSION IN NINETEENTH-CENTURY AMERICA (2003); DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 27–44, 193–200 (1997). By "pornography," I refer to published sexually explicit material that is designed specifically for the purpose of sexually arousing its audience. It is a broader category than "obscenity," a legal term of art to denote material that the Supreme Court has deemed unprotected. I use the broader term because I wish to leave open, at the outset of the inquiry, the possibility that (as some people think) no pornography should be unprotected.

2. Jeffrey G. Sherman, *Love Speech: The Social Utility of Pornography*, 47 STAN. L. REV. 661 (1995).

I. MADISONIAN FREE SPEECH

The First Amendment provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[3] The plain language is uncertain as to the scope of its protection. Many things that one can do with language have been held to be outside its protection, notably defamation with actual malice,[4] false or misleading commercial advertising,[5] fraudulent solicitation,[6] incitement to lawbreaking,[7] or threats of violence.[8] It is unlikely that the framers of the Amendment intended to protect these things, but original intent is a poor source of authority, because the framers did not give much thought to any of the controversial problems of interpretation that have since come before courts.[9]

Courts and scholars have offered a number of different accounts of why free speech is protected, each account implying a different scope of protection. The people can't control the government if the government gets to control what the people think.[10] Discussion controlled by the state is less likely to discover truth than a free market in ideas.[11] Human dignity depends on the freedom of the mind.[12] Each of these plays some role in free

3. U.S. CONST. amend. I.

4. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283–84 (1964).

5. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771–72 & n.24 (1976); *see also In re* R.M.J., 455 U.S. 191, 203 (1982) ("But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely.").

6. Ill. *ex rel.* Madigan v. Telemarketing Assocs., 538 U.S. 600, 624 (2003).

7. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

8. Virginia v. Black, 538 U.S. 343, 359–360 (2003).

9. *See* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS (1985).

10. The Supreme Court has stated that:

> Whatever differences may exist about interpretation of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussion of candidates, structures and forms of government, the manner in which government is operated or should be operated and such matters relating to political processes.

Mills v. Alabama, 384 U.S. 214, 218–19 (1966). *See also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982); Roth v. United States, 354 U.S. 476, 484 (1957); Stromberg v. California, 283 U.S. 359, 369 (1931); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993); Harry Kalven Jr., *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191.

11. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . ."); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); JOHN STUART MILL, ON LIBERTY (Elizabeth Rapaport ed., Hackett Publ'g Co. 1978) (1859).

12. *See* Wooley v. Maynard, 430 U.S. 705, 714 (1977); MARTIN REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS (1984); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978); David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974); Thomas Scanlon, Jr., *A*

speech law. Frederick Schauer has suggested that "we might in fact have several first amendments,"[13] one directed toward government suppression of its critics, another toward open inquiry in the sciences, and so forth.

Of these accounts, Eric Barendt observes, "the argument from democracy has been much the most influential theory in the development of contemporary free speech law."[14] There are arguments for the protection of pornography that rely on the advancement of truth or the fulfillment of human autonomy,[15] but an argument tied to the democratic rationale may stand on firmer ground. But is it possible to make such an argument persuasive?

The classic formulation of the democratic justification for free speech is that of James Madison in his 1799 *Report on the Virginia Resolutions*. The Sedition Act of 1798 made it a crime to write about Congress or the President "with intent to defame" or "to excite against them . . . the hatred of the good people of the United States."[16] Madison wrote a resolution, subsequently enacted by the Virginia legislature, declaring that the Sedition Act was unconstitutional. The Act, the resolution declared, "ought to produce universal alarm, because it is leveled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right."[17] He supported the resolution with a report elaborating on its claims. Madison's best argument was the following:

> 1. The Constitution supposes that the President, the Congress, and each of its Houses may not discharge their trusts, either from defect of judgment or other causes. Hence they are all made responsible to their constituents, at the returning periods of election; and the President, who is singly intrusted with very great powers, is, as a further guard, subjected to an intermediate impeachment.
> 2. Should it happen, as the Constitution supposes it may happen, that either of these branches of the government may not have duly discharged its trust, it is natural and proper that, according to the cause and degree of their faults, they should

Theory of Freedom of Expression, 1 PHIL. & PUB. AFF. 204 (1972); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991).

13. Frederick Schauer, *Must Speech Be Special?*, 78 NW. U. L. REV. 1284, 1303 (1983).

14. ERIC BARENDT, FREEDOM OF SPEECH 20 (2d ed. 2005).

15. *See, e.g.*, NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS (1995).

16. Ch. 74, § 2, 1 Stat. 596, 596–97 (1798).

17. James Madison, *The Virginia Report*, *in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 243 (Marvin Meyers ed., rev. ed. 1981).

> be brought into contempt or disrepute, and incur the hatred of the people.
>
> 3. Whether it has, in any case, happened that the proceedings of either, or all of those branches evince such a violation of duty as to justify a contempt, a disrepute, or hatred among the people, can only be determined by a free examination thereof, and a free communication among the people thereon.[18]

If public officials are to be held accountable by elections, then the electors must be able to discuss among themselves the merits of the office-holders.

Thus, free speech must, at a minimum, protect criticism of the incumbent government. It must bar censorship by the incumbent government that inhibits discourse that would tend to induce voters to vote against incumbents, or that would otherwise forestall political change.

The argument is a powerful one, not least because it relies not at all on the ambiguous text of the First Amendment. It rather infers a right of free speech from the structural commitment to elections.

I. THE LIMITS OF MADISON

Madison does not offer a general theory of free speech, or even an account of where the boundaries of protected speech lie. His aim simply is to show that the Sedition Act is unconstitutional. And so we are left with a problem: if we do accept Madison's argument, what speech have we committed ourselves to protect?

One well-known answer is that offered by Robert Bork in a 1971 article.[19] Bork claimed that, because the function of the free speech guarantee is to protect political discussion, "[t]he category of protected speech should consist of speech concerned with governmental behavior, policy or personnel, whether the governmental unit involved is executive, legislative, judicial or administrative."[20] Protection extends only to "explicitly and predominantly political speech."[21] There, is, however, no basis for protecting any art and literature (or, for that matter, any other speech) that is not explicitly political.[22]

18. *Id.* at 263–64.

19. Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

20. *Id.* at 27–28.

21. *Id.* at 26.

22. Bork substantially retreated from this position during the 1987 hearings on his failed Supreme Court nomination. ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA 242–51 (1989); NORMAN VIEIRA & LEONARD GROSS, SUPREME COURT APPOINTMENTS:

Bork's view is too cramped, even if free speech is understood in purely Madisonian terms. To see the limits of Bork's argument, even as a defense of political speech, it should be sufficient to note that some propositions of fact, not explicitly political, can nonetheless obviously function as criticism of incumbent government. It should also be clear that Madison's approach to free speech condemns state censorship of at least some propositions of fact, even if these are not explicitly political.

Consider a recent controversy involving scientific speech. The Administration of President George W. Bush was accused of distorting scientific knowledge by manipulating scientific advisory committees, distorting and suppressing official statements of scientific information, and interfering with scientific research. Such distortions were alleged most particularly with respect to issues that concern the religious right, such as abortion, abstinence education, and stem cell research, and issues with significant economic consequences for the President's large corporate supporters, such as workplace safety and global warming.[23]

Now suppose that Congress enacted a law making it a crime to allege (1) that "abstinence only" sex education does not diminish the incidence of teen pregnancy, (2) that the planet is becoming warmer because of human use of carbon-based fuels, or (3) that abortions do not increase the risk of breast cancer.[24] Bork's principle would not be violated by such a law. None

JUDGE BORK AND THE POLITICIZATION OF SENATE CONFIRMATIONS 99–105 (1998). He has since conceded that novels, plays, and scientific speech "are frequently freighted with political meaning[,]" but he has fallen back on the view that pornography contains no ideas. ROBERT H. BORK, A TIME TO SPEAK: SELECTED WRITINGS AND ARGUMENTS 219 (2008). His free speech views have become unclear. He rejects the rule that pornography, to be unprotected, must lack serious literary, artistic, political, or scientific value, *id.* at 243–45, and the idea that there is "a right to display a picture of the Virgin Mary festooned with pornographic pictures and cow dung[,]" *id.* at 379, but does not explain what then distinguishes pornography from protected art. Similar doubts are raised by his claim that "stories depicting the kidnapping, mutilation, raping, and murder of children do not, to anyone with a degree of common sense, qualify as ideas." ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 148 (1996). He laments "the Court's reckless expansion of the 'speech' protected by the First Amendment to encompass . . . a sickening variety of obscenities." Robert H. Bork, *The Judge's Role in Law and Culture*, 1 AVE MARIA L. REV. 19, 21 (2003). Appended to this sentence is a citation to, inter alia, Butler v. Michigan, 352 U.S. 380 (1957), which he accurately summarizes as "holding unconstitutional a ban on the sale to adults of books deemed harmful to children." *Id.* at 21 n.7. Evidently Bork now thinks that it is permissible for a state to "reduce the adult population . . . to reading only what is fit for children." *Butler*, 352 U.S. at 383. This implies an even narrower interpretation of the First Amendment than his original view, since some core political speech may be unfit for consumption by children. It is doubtful whether, on this view, the Amendment would protect publication of Independent Counsel Kenneth Starr's report on the Clinton-Lewinsky scandal, for example.

23. *See* Andrew C. Revkin, *Bush vs. the Laureates: How Science Became a Partisan Issue*, N.Y. TIMES, Oct. 19, 2004, at F1; Alison McCook, *Sizing Up Bush on Science*, THE SCIENTIST, Oct. 31, 2006, at 31; H.R. Comm. on Government Reform, Minority Staff Spec. Investigations Division, Politics and Science in the Bush Administration (updated Nov. 13, 2003).

24. All of these are scientific claims that contradict positions taken by the Bush Administration.

of the forbidden claims are "explicitly and predominantly political speech." Yet all of them are obviously interventions into ongoing political controversies. The law in question is problematic for just the same reasons as the 1798 Sedition Act: it is an attempt to entrench the incumbent government by suppressing speech critical of that government.

Bork observes correctly that "the rationale of the first amendment cannot be the protection of all things or activities that influence political attitudes."[25] All speech, and indeed all conduct, may do that, but it would be silly to say that the First Amendment bans government from regulating conduct.

On the other hand, here the speech is obviously political because its context makes it so. Perhaps that is enough to make it count as "speech about how we are governed."[26]

If so, free speech protection should be extended to protect the assertion of politically relevant facts, even if that assertion is not expressly political. But this obviously doesn't get us to pornography. Is there an argument for a still further extension of Madisonian free speech theory?

Literature can be implicitly critical of government in just the way that scientific speech can be. Bork's logic easily condemns the suppression, before the Civil War, of abolitionist pamphlets by Southern governments and the U.S. post office. These almost always included proposals to change the law.[27] The most potent single antislavery publication, however, was a novel, Harriet Beecher Stowe's *Uncle Tom's Cabin*.[28] Would no Madisonian problem be raised by its suppression?[29]

Yet even this doesn't get us to pornography. Stowe's novel is offering an opinion about an obviously political issue, albeit in literary form. Can the same be said of pornography?

See H.R. Comm. on Government Reform, *supra* note 23.

25. Bork, *supra* note 19, at 28. This objection is important, because it destroys Alexander Meiklejohn's rather summary neo-Madisonian argument for protection of art and literature. *See* Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 256–57. The present article seeks to rehabilitate Meiklejohn's claim.

26. Bork, *supra* note 19, at 28.

27. *See* MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 117–299 (2000); W. SHERMAN SAVAGE, THE CONTROVERSY OVER THE DISTRIBUTION OF ABOLITION LITERATURE 1830-1860 (1938).

28. Within ten years of its publication, "it had sold more than two million copies in the United States, making it the best seller of all time in proportion to population." JAMES B. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 89 (1988).

29. Stowe's novel was in fact hard to obtain in the South, but the suppression was conducted primarily by extralegal means, such as violence against its distributors. *See* THOMAS F. GOSSETT, *UNCLE TOM'S CABIN* AND AMERICAN CULTURE 210–11 (1985); CLAIRE PARFAIT, THE PUBLISHING HISTORY OF *UNCLE TOM'S CABIN*, 1852–2002, at 94–98 (2007).

II. THE MADISONIAN PORNOGRAPHY PROBLEM

One of the classic arguments against protection of pornography claims that pornography is not speech because it contains no ideas. If this is true, then it follows a fortiori that pornography cannot contain political ideas. The Supreme Court has several times embraced this claim. The germinal case of *Chaplinsky v. New Hampshire*[30] declared that "certain well-defined and narrowly limited classes of speech," among them "the lewd and obscene," were outside the protection of the First Amendment, because "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[31] When it announced the present constitutional test for unprotected obscenity, the Court declared that "[p]reventing unlimited display or distribution of obscene material, which by definition lacks any serious literary, artistic, political, or scientific value as communication, is distinct from a control of reason and the intellect."[32]

The Court's argument, however, rests on an impoverished conception of reason and the intellect.

It is possible to disagree with the incumbent government, not just about matters of fact, but also about matters of value. Political speech concerns practical questions. Practical reason involves deliberation about norms, about what is obligatory and what is desirable.

If questions of what is desirable are a part of political discourse, then political discourse cannot only take the form of deductive demonstration.If I am going to argue that something is intrinsically valuable—say, if I want to argue that the Grand Canyon should be kept as a national park and shielded from development, merely because it is beautiful—then the only way I can hope to convince you is to somehow get you to perceive its beauty.

Robert Post rejects Bork's proposal because the formation of a common democratic will requires "deliberation about our identity as a people, as well as about what specifically we want our government to do."[33] Quot-

30. 315 U.S. 568 (1942).

31. *Id.* at 571–72.

32. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67 (1973) (citation omitted) (citing John M. Finnis, *"Reason and Passion": The Constitutional Dialectic of Free Speech and Obscenity*, 116 U. PA. L. REV. 222 (1967)); *see also* Miller v. California, 413 U.S. 15, 34–35 (1973); Roth v. United States, 354 U.S. 476, 484 (1957). I have addressed this claim at greater length elsewhere. *See* Andrew Koppelman, *Is Pornography "Speech"?*, 14 LEGAL THEORY 71 (2008); Andrew Koppelman, *Free Speech and Pornography: A Response to James Weinstein*, 31 N.Y.U. REV. L. & SOC. CHANGE 899 (2007).

33. ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY AND

ing Charles Taylor, Post defines "identity" as "an orientation in 'moral space,' a framework within which we 'can try to determine from case to case what is good, or valuable, or what ought to be done.'"[34] "To classify speech as public discourse is . . . to deem it relevant to this collective process of self-definition and decision–making."[35] Speech that concerns identity in this sense is implicitly political.

All speech is potentially relevant to this process, so this argument proves too much. The Court is properly unwilling to restrict, for example, ordinary libel suits by private citizens, even though defamation is obviously relevant to collective self-definition. Defamation of public officials is a different matter: the court has restricted such suits because "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so."[36] A defamed public official therefore must prove that the defamatory statement "with knowledge that it was false or with reckless disregard of whether it was false or not."[37] The court has extended this protection beyond defamation of public officeholders, but has not displaced all of defamation law: discussion of "matters of public concern" is significantly protected from defamation suits; discussion that is not about such matters is not. So a great deal turns on what is deemed "public." It is hard to see how the Court could have avoided devising a categorization of this kind, but the effort inevitably begets intractable difficulties.

In practice, Post observes, the Court uses this term to signify two very different ideas. One conception of public concern is normative: "the speech at issue is about matters that ought to be of interest to those who practice the art of democratic self-governance."[38] Sometimes, however, the meaning is descriptive: "the speech at issue concerns matters that large numbers of people already know, and thus are 'public' in a purely empirical sense."[39] The Court is unable to rest comfortably in either of these meanings. The normative conception, to the extent that it is used to exclude speech from public discourse, is incompatible with the democracy it seeks to protect, because it arrogates to the courts the question of what ought to

MANAGEMENT 166 (1995).

34. *Id.* at 273 (quoting CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY 27–28 (1989)).

35. *Id.* at 166.

36. New York Times v. Sullivan, 376 U.S. 254, 279 (1964).

37. *Id.* at 280.

38. POST, *supra* note 33, at 164.

39. *Id.*

be on the political agenda. The descriptive conception, however, is overinclusive and underinclusive: it includes trivia about celebrities, but excludes unknown matters that are obviously relevant to governance.

The very effort to distinguish public from private matters, Post observes, is already politically loaded, and presupposes controversial criteria about the proper subject of politics.[40] "[A]ll speech is potentially relevant to democratic self-governance, and hence according to democratic logic all speech ought to be classified as public discourse."[41] But, Post notes, we have other commitments beside public discourse, and public discourse itself depends on some civility norms. "The many factors relevant to the classification of speech as public discourse thus resist expression in the form of clear, uniform, and helpful doctrinal rules."[42]

The delineation of matters of public concern that we actually have draws on both conceptions: it is relevant if a matter is actually an object of public discussion, and it is relevant if it is clearly pertinent to governance.[43] If a given communication is both the object of discussion and is relevant to live political issues, then it is clearly public discourse. That is why scientific speech about global warming presents a very easy case. The same can be said of any general proposition of fact, since descriptions of the world are such a proximate input of politics.

The same point, I will now argue, is true of general propositions of value.

One object of political contestation, obviously salient today, is the question of what uses of the sexual faculties are good and ought to be protected, perhaps even approved of, by the state. How is one to promote a point of view on that issue?

Robert George observes that:

> [I]ntrinsic values, as *ultimate* reasons for action, cannot be deduced or inferred. We do not, for example, infer the intrinsic goodness of health from the fact, if it is a fact, that people everywhere seem to desire it. . . . We see the point of acting for the sake of health, in ourselves or in others, just for its own sake, without the benefit of any such inference.[44]

If the value of health is defended as a means to some other end, then the question will arise why *that* is a good thing; the chain of reasoning has to

40. *See id.* at 280–82.

41. *Id.* at 175.

42. *Id.* at 173.

43. One aspect of pornography which is probative of the first factor is the fact that it is disseminated through media of mass communication. *See id.* at 164–73. It is also always presumptively improper to ban speech on the basis of particular communities' civility rules. *Id.* at 148–50.

44. ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW 48 (1999) (emphasis added).

conclude somewhere, with some good that is deemed good in itself and not as a means to something else. The goodness of intrinsic goods can only be defended dialectically:

> While [intrinsic goods] may be defended by dialectical arguments designed either to rebut arguments against them, or to show up the defects or inadequacies of ethical theories that attempt to do without them, they cannot themselves be deduced or inferred or derived from more fundamental premises. One cannot argue one's way to them (the way one can, on the basis of more fundamental premises, argue one's way to a conclusion). The claim that they are self-evident does not imply that they are undeniable or, still less, that no one denies them. What it does imply is that the practical intellect may grasp them, and practical judgment can affirm them without the need for a derivation. (which is not to say that they can be grasped without an understanding of the realities to which they refer.)[45]

Thus, for example, George thinks that homosexual sex damages the good of marriage–a good that he understands as the indissoluble union of a man and a woman, in which contraception is never used. He can make his case only by showing that marriage is a good with just the characteristics he describes, and is susceptible to damage in the ways he imagines.[46] These claims are reasoned claims, and their political entailments are obvious. For example, he has invoked them to justify the criminalization of homosexual sex and a constitutional amendment against same-sex marriage.[47] Claims to the contrary, that homosexual sex is valuable, are political in exactly the same way. How is this disagreement to be resolved? George proposes dialectical debate. I'm with him: we are both professors, former Princeton colleagues, and friends; philosophical debate is what we do.

There are, however, other means of persuasion. Thomas Scanlon observes that, if some citizens want to persuade others to change their views about sexual mores:

> Earnest treatises on the virtues of sexually liberated society can be reliably predicted to have no effect on prevailing attitudes towards sex. What is more likely to have such an effect is for people to discover that they find exciting and attractive portrayals of sex which they formerly thought

45. *Id.* at 45. For this reason, it is not the case that claims of value are inevitably parasitic on claims of fact, as Larry Alexander claims. LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? 71 (2005).

46. *See* Patrick Lee & Robert P. George, *What Sex Can Be: Self-Alienation, Illusion, or One-Flesh Union*, 42 AM. J. JURIS. 135 (1997). For a critique of this argument, see ANDREW KOPPELMAN, THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW 80–93 (2002); Andrew Koppelman, *The Decline and Fall of the Case Against Same-Sex Marriage*, 2 U. ST. THOMAS L.J. 5 (2004); Andrew Koppelman, *Is Marriage Inherently Heterosexual?*, 42 AM. J. JURIS. 51 (1997).

47. Robert P. George, *The Concept of Public Morality*, 45 AM. J. JURIS. 17, 30–31 (2000); Robert P. George, *One Man and One Woman*, WALL ST. J., Nov. 28, 2003, at A8; Robert P. George, *The 28th Amendment*, NAT'L REV., July 23, 2001, at 32.

> offensive or, vice versa, that they find boring and offensive what they had expected to find exciting and liberating.[48]

But this may all seem quite theoretical. It might appear fanciful to suggest that pornography is actually likely to constitute a genuine intervention into political life. James Weinstein thinks it a "fairly safe assumption" that "the number of people who produce or distribute pornography primarily for political purposes is relatively small."[49] This is why Sherman's work is so important.

III. THE IMPORTANCE OF JEFFREY SHERMAN

Love Speech responds to the arguments of some feminists, notably Catharine MacKinnon and Cass Sunstein, who claim that all pornography promotes male sexual supremacy and dehumanizes both its producers and its consumers. MacKinnon and Sunstein both want to empower the law to act against pornography, but Sherman does not directly attack their legal arguments. His concern is centrally with their normative claims. He aims to rebut the view that pornography as such is worthless and harmful. Sherman is dissatisfied with the "grudging and unengaged"[50] defense of pornography that liberal theorists offer, which concedes that pornography is of low value but seeks to defend it nonetheless.

Sherman wants to show that pornography is valuable. He does this by focusing on one kind of pornography—that directed at gay men.

Such pornography, he argues, has been particularly liberating for young gay men raised in conservative households, whose predicament is largely a consequence of the way in which they have been kept in ignorance. Ignorance induced by the suppression of information is, of course, one of the central evils that the First Amendment aims to prevent. Sherman eloquently describes the consequences of this ignorance:

> The young gay male inhabits a world that teaches him to despise his most powerful feelings. This world isolates him from his parents, who are probably not gay themselves and who may be as homophobic as his tormentors; tells him that people like him are sick, contemptible, and justly despised; offers him no positive images of gay sexuality and no hope of integrating his sexuality with the rest of his life. He experiences sexual impulses but receives no encouragement or instruction about how to act upon those feelings in a healthy, self-affirming manner. His heterosexual contemporaries enjoy considerable encouragement from peers

48. T. M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 547 (1979).

49. James Weinstein, *Democracy Sex and the First Amendment*, 31 N.Y.U. REV. L. & SOC. CHANGE 865, 889 (2007).

50. Sherman, *supra* note 2, at 662.

> and family and find heartening models in the ubiquitous images of idealized or graphic heterosexual coupling that flood the airwaves and motion picture screens, but heterocentrism and homophobia leave the young gay man fearing that gay sexual encounters are necessarily furtive and debasing. Many gay men remember feeling as if they were "the only one." Even if they did not feel totally alone, they believed they were the only gay men who were not sly sexual predators.[51]

For such men, gay pornography is a revelation. The revelation consists both in the information that it provides and the valuation it places on this information. "[A] gay adolescent male's encounter with gay pornography . . . explodes negative stereotypes that the young man has internalized and offers him models of exuberant, affirming, unashamed sexual interactions between desirable men."[52]

Explicitly sexual images provide this affirmation in a way that nonsexual images cannot. "[T]he issue in a young gay man's quest for self-acknowledgement and self-acceptance is not holding hands or hugging or kissing or running through a meadow in slow motion. The issue is the sexual act."[53] Explicit pornography, or even photographs of naked men that suggest sexual availability, can and do lead gay teenagers to "realize that there were others out there with sexual feelings for men: indeed, enough of them to create a market for such photographs."[54]

Sherman shows that pornography has played an important role in many young gay men's development of their own self-understanding. One writer described a magazine with photos of nude men posing as "the first clue I ever had that being queer existed out there in the world."[55] Sherman also cites a study finding that pornography is an important source of information about sex for college-age gay men.[56]

Sherman's interest in legal doctrine is primarily aimed at showing how feminist antipornography standards lend themselves to inappropriate deployment against gay pornography.[57] He does not discuss basic free speech theory. Perhaps he is discouraged from doing so by free speech theorists' tendency to bracket the question of pornography's value. Since free speech theory protects even worthless and harmful speech,[58] it is a

51. *Id.* at 681–82 (footnotes omitted).

52. *Id.* at 682.

53. *Id.* at 683.

54. *Id.* at 685 n.130.

55. *Id.* at 688 (quoting PAUL MONETTE, BECOMING A MAN: HALF A LIFE STORY 82–83 (1992)).

56. *Id.* at 682 (citing David F. Duncan & J. William Donnelly, *Pornography as a Source of Sex Information for Students at a Private Northeastern University*, 68 PSYCH. REP. 782 (1991)).

57. *Id.* at 694–99.

58. *See* George Kateb, *The Freedom of Worthless and Harmful Speech*, *in* LIBERALISM WITHOUT ILLUSIONS: ESSAYS ON LIBERAL THEORY AND THE POLITICAL VISION OF JUDITH N. SHKLAR 220

poor vehicle for developing his claim that gay male pornography is neither worthless nor harmful.

Here I want to focus not on the question of pornography's therapeutic value for individuals, but rather on the value of pornography as political speech. What Sherman has shown is that gay male pornography, which gave many gay men an early window into their own sexuality, has played a significant role in the emergence of the gay rights movement, which in turn gave rise to one of the most pressing and divisive questions in contemporary American politics. Absent gay pornography, the course of modern American politics might have been very different.

IV. THE BOUNDARIES OF PUBLIC DISCOURSE

Recall that, according to Post, the classification of speech as protected "public discourse" turns on two factors: whether the subject matter is actually an object of public discussion, and whether it is clearly pertinent to governance. The easiest case for protection is speech about a matter that is both the object of public discussion and is relevant to live political issues. Sherman shows that pornography, at least gay male pornography, satisfies both of these criteria.

It is no longer possible to claim without embarrassment that the proper use of the sexual faculties is not an appropriate subject matter for political debate.[59] Pornography speaks directly to that subject matter. Sherman has taught us that it has in fact operated in just the way imagined by Scanlon, by persuading its audience "that they find exciting and attractive portrayals of sex which they formerly thought offensive."

Post argues that "there can be no final account of the boundaries of the domain of public discourse. We can and do have firm convictions about the core of that domain, but its periphery will remain both ideological and vague, subject to an endless negotiation between democracy and community life."[60]

Sherman has shown that at least some pornography is not at the periphery of public discourse about sexuality. It is at the core. It provides politically relevant information about the kinds of sexual practices that people engage in. It is persuasive speech about the very general question of what kinds of sex are humanly attractive.

(Bernard Yack ed., 1996).

59. It was once. Any approving reference to same-sex relationships subjected a publication to censorship as recently as the 1960s. *See* WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 32–34, 46–49, 78, 116–123 (1999).

60. POST, *supra* note 33, at 177 (footnote omitted).

If there's a larger lesson here, it is that speech consisting of claims about what goods are worth pursuing should always be understood to be part of public discourse. Since Socrates, a central question for philosophy has been that of how we ought to live. It is also the central question for democracy. In order to answer that question, we need to be able to articulate visions and ideas of the good, even if those are not obviously political.[61] They always have political implications. That is why Plato wanted to expel the poets from his Republic.

The political agenda is up to us, but we cannot control it unless the political agenda is embedded within a larger conversation about the good. It is only in light of some conception of the good that it makes any sense to put anything at all onto the political agenda. One cannot engage in any kind of practical reasoning without reference to what is good.[62] Conversation about what is good is thus the center of public discourse, the motor that powers all collective decisions.

This is why free speech protects even apparently nonpolitical art. All art is communication from one mind to another. Art always concerns ideas of value, even if the value in question is only a claim about the self-contained value of art itself. Art, then, is not and cannot be peripheral to politics. Contra Plato, it would be disastrous to expel the poets from the city. They are the city.

Bork's objection is that the capacity to influence political attitudes does not distinguish speech from conduct, and the First Amendment cannot be reasonably understood to bar government regulations of conduct. He argues that the line he proposes to draw is necessary "[i]f the dialectical progression is not to become an analogical stampede."[63] This amounts to a claim that no other workable line can be drawn.

In first amendment law today, public discourse is that line. It is admittedly a somewhat fuzzy line, but not an unworkable one. Most free speech cases are easy cases, even if theory has difficulty explaining why.[64] I have here offered one theoretical clarification: Laws should be invalidated when they seek to block the communication of claims about what goods are worth pursuing—claims, to borrow Taylor's phrase, about our appropriate orientation in moral space.

61. Put in Post's terms, speech articulating such ideas invariably satisfies his second factor for determining whether speech is public discourse: it is always pertinent to governance.

62. *See* RICHARD KRAUT, WHAT IS GOOD AND WHY 210 (2007).

63. Bork, *supra* note 19, at 27.

64. Post notes this in *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 153 (Lee Bollinger & Geoffrey Stone eds. 2002).

Gay pornography makes such claims. "In its dissenting voice," Leslie Green observes, "gay pornography celebrates the male body as sexually desirable to other men; it displays men enacting this desire; it focuses our attention on that one fact about them; it exaggerates and overvalues it."[65] The same point can be made about pornography more generally. Pornography has always addressed our orientation in moral space. Lynn Hunt observes that, after 1660, when pornography first emerged as a distinctive genre, "the self-conscious aim of arousing sexual desire in the reader" was accompanied by "the juxtaposition of the material truth of sex against the hypocritical conventions of society and the rulings of the church" and that these "were related to the new emphasis on the value of nature and the senses as sources of authority."[66] Helen Lefkowitz Horowitz, in a marvelous study of discourse on sex in nineteenth century America, has shown that a vibrant conversation about marriage, contraception, and sexual ethics was choked off near the end of the century by the newly energized censorship of obscenity (which at that time was very broadly defined, to include any dissenting speech about sexual mores).[67] Even pornography that makes no claims about social institutions, however, addresses questions of moral orientation. It claims that certain pleasures are goods worth pursuing. Material that does not so claim may sexually arouse some viewers, but it does not aim at such arousal and so is not pornography.

The fact that pornography aims specifically at sexual arousal is sometimes cited as a reason to exclude it from protection, and that is what the Supreme Court has done with the ill-defined subset of pornography it deems "obscene."[68] The argument I have developed here shows that this is a perverse conclusion, as perverse as the idea that speech forfeits protection if it tends to diminish an incumbent politician's chances of reelection.[69]

The protection of ideas of the good is reflected in another free speech rule that may appear to be only tangentially related to the question of protection of pornography, but which actually reflects the considerations that I have articulated here. That is the prohibition of viewpoint discrimination. Claims about what is good, outside the sexual sphere, are precisely what

65. Leslie Green, *Pornographies*, 8 J. POL. PHIL. 27, 48 (2000).

66. LYNN HUNT, THE INVENTION OF PORNOGRAPHY 30 (1993).

67. Horowitz, *supra* note 1.

68. This position is described and critiqued in Andrew Koppelman, *Is Pornography "Speech"?*, 14 LEGAL THEORY 71 (2008), and Andrew Koppelman, *Free Speech and Pornography: A Response to James Weinstein*, 31 N.Y.U. REV. L. & SOC. CHANGE 899 (2007).

69. I know that sounds like something I made up, but in United States v. Cooper, 25 F.Cas. 631 (C.C.D. Pa. 1800), Supreme Court Justice Samuel Chase, presiding at trial, charged the jury that the defendant had violated the statute, because his "evident design" was "to arouse the people against the president so as to influence their minds against him on the next election." *Id.* at 641.

free speech law means by "viewpoints." Regulations of speech that are directed at the content of the speech, and penalize it for making claims when there would be no penalty for making opposite claims, are not "viewpoint discrimination," as the law defines it, if they do not involve claims about the good. Defamation, fraudulent solicitation, incitement to lawbreaking, threats of violence, or the other modes of verbal conduct that are traditionally placed outside the realm of free speech protection are not protected by the viewpoint discrimination ban. Some explanation is needed for this. Viewpoints of a kind are certainly reflected in speech alleging that the mayor is a child molester (when he really isn't), that the bonds I am trying to sell you are not counterfeit, that we ought to go lynch that guy, and that I will shoot you if you don't give me your wallet. The speech in each of these cases is unprotected, even though speech asserting the opposite would not be penalized. The principle I have advocated does not come into play here. The speech in each of these cases presents a viewpoint, but none of the viewpoints involve claims about what goods should be pursued.[70]

Restrictions on speech are unconstitutional if they discriminate on the basis of viewpoint, even if the speech that is regulated is worthless for free speech purposes.[71] This rule has elicited the objection that constitutionally worthless speech by definition does not deserve free speech protection.[72] Sherman shows, however, that the ban on viewpoint discrimination is not overinclusive, at least when it protects pornography: it is not the case that, if the ban on viewpoint discrimination is relaxed to permit suppression of pornography, nothing of free speech value is lost.[73]

70. A distinction implicit in these rules is that between claims of value and claims of fact. Claims of fact, even untrue claims, *see* New York Times Co. v. Sullivan, 376 U.S. 254 (1964), discussed *supra* text accompanying notes 36–37, may or may not be protected. Claims of value always are.

Larry Alexander argues that the fact-value distinction is incoherent, at least as a basis for free speech doctrine. When government tries to obstruct value-laden expression because it wants to prevent the audience from adopting the values advocated therein, this must be because the expression is "heavily larded with implicit factual assertions" and it is the audience's acceptance of these (by hypothesis false) assertions that government wants to prevent.

> A statement asserting an incorrect value must at some level be mistaken factually or imply a fact that does not exist (such as that the speaker has some special moral insight). When all the relevant facts about the world and the speaker are disclosed to the audience, the speaker's assertions of value will themselves be inert and thus of no interest to the government.

ALEXANDER, *supra* note 45, at 71 (emphases omitted). Pornography is a counterexample. Just what false factual claim does pornography (explicitly or implicitly) communicate?

71. *See, e.g.*, R.A.V. v. St. Paul, 505 U.S. 377 (1992).

72. *See, e.g.*, *id.* at 399–403 (White, J., concurring).

73. It is also worth noting that the Supreme Court itself admitted that viewpoint was at issue in pornography regulation when, in describing what it took to be the state's legitimate interest in suppressing obscenity, it declared that "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973) (citations omitted). The state's interest is in suppressing what it regards as a "debased and distorted" viewpoint.

Sherman shows just how pornography affects politics. Gay pornography offers to its audience a controversial conception of the good achievable by sex—one that many people regard, at that time, as "debased and distorted." Some members of the audience—specifically, young gay men—read and are aroused. Arousal is persuasion, in just the way contemplated by Scanlon. These men then seek to persuade their fellow citizens, that same-sex relationships are good and ought to be recognized by the law. The upshot has been, amid some nasty, continuing political struggles, a major change in the law: as this is written, nearly a quarter of the population of the United States lives in a jurisdiction that recognizes same-sex relationships as marriages or their functional equivalent.[74] It is hard to imagine how that could have happened if the state could have prevented the transmission from mind to mind of the thought that gay sex is good.

CONCLUSION

The Madisonian argument does not settle the question whether pornography ought to be constitutionally protected. We have not yet considered the question of the countervailing state interest. Even if a given kind of speech is presumptively protected by Madisonian considerations, there still may be an overriding reason for suppression, either from within the political perspective or from outside it. One would have to consider and weigh those reasons.[75] But Sherman shows that suppression raises deep Madisonian concerns.

When such speech is suppressed, it is not the case that "the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." *R.A.V.*, 505 U.S. at 390. Official suppression of ideas is precisely what the prohibition of pornography seeks to accomplish.

74. Based on U.S. Census population figures for 2008: U.S., 304,059,724; Massachusetts, 6,497,967; Connecticut, 3,501,252; Iowa, 3,002,555; Vermont, 621,270; California, 36,756,666; New Hampshire, 1,315,809; New Jersey, 8,682,661; Oregon, 3,790,060; Washington, 6,549,224. The first four of these call the relationships "marriage," while the others use "domestic partnerships" or "civil unions." *See* CAL. FAM. CODE §§ 297–299.6 (West 2007); N.H. REV. STAT. ANN. §§ 457-A:1 to 457-A:8 (LexisNexis 2008); N.J. STAT. ANN. §§ 26:8A-1 to 26:8A-13 (West 2007); N.J. STAT. ANN. §§ 37:1-28 to 37:1-36 (West 2008); OR. REV. STAT. note following § 106.990 (2007); WASH. REV. CODE, Ch. 26.60. The nine states combined add up to 70,717,464, or 23% of the U.S. All figures are taken from U.S. Census Bureau, American Factfinder, http://factfinder.census.gov.

75. *See* Andrew Koppelman, *Why Phyllis Schlafly is Right (But Wrong) About Pornography*, 31 HARV. J. L. & PUB. POL'Y 105 (2008); Andrew Koppelman, *Eros, Civilization, and Harry Clor*, 31 N.Y.U. REV. L. & SOC. CHANGE 855 (2007); Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635 (2005); Andrew Koppelman, *Reading Lolita at Guantánamo: Or, This Page Cannot be Displayed*, DISSENT, Spring 2006, at 64.